

BEFORE THE COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL FOR THE MARYLAND-
WASHINGTON REGIONAL DISTRICT IN
MONTGOMERY COUNTY, MARYLAND
Office of Zoning and Administrative Hearings
Stella B. Werner Council Office Building
100 Maryland Avenue, Room 200
Rockville, Maryland 20850
(240) 777-6660

IN THE MATTER OF: RALPH J. DUFFIE, INC.

Applicant

Les Powell

David O'Bryan

John Stovall

Stephen Peterson

Shane Pollin

For the Application

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Attorney for the Applicant

Eileen Finnegan

Neighbor

Conditionally Supporting the Application

Martin Klauber, Esquire

People's Counsel

In Support of the Application

Shahriar Etemadi

Cherian Eapen

M-NCPPC Technical Staff

In Support of the Application

Before: Martin L. Grossman, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

TABLE OF CONTENTS

	Page No.
I. EXECUTIVE SUMMARY	3
II. STATEMENT OF THE CASE.....	4
III. FINDINGS OF FACT	5
A. SUBJECT PROPERTY	5
B. SURROUNDING AREA.....	7
C. ZONING HISTORY	10
D. PROPOSED DEVELOPMENT	11
E. SCHEMATIC DEVELOPMENT PLAN AND BINDING ELEMENTS	13
F. MASTER PLAN	19
G. SPECIAL REGULATIONS AND DEVELOPMENT STANDARDS OF THE ZONE	20
H. PUBLIC FACILITIES.....	22
1. Transportation	22
2. Utilities	29
3. Schools.....	29
I. ENVIRONMENT	29
J. COMMUNITY CONCERNS	31
IV. SUMMARY OF HEARING	32
A. APPLICANT’S CASE IN CHIEF	32
B. WITNESS FROM THE COMMUNITY.....	38
C. M-NCPPC TECHNICAL STAFF WITNESS.....	38
D. PEOPLE’S COUNSEL	40
V. ZONING ISSUES.....	40
A. THE ZONE’S REQUIREMENTS	42
B. THE PURPOSE CLAUSE.....	43
C. COMPATIBILITY	43
D. PUBLIC INTEREST	44
1. Master Plan Conformity; the Planning Board; and the Surrounding Area	44
2. Public Facilities and the Environment.....	45
VI. CONCLUSIONS.....	46
VII. RECOMMENDATION.....	47

I. EXECUTIVE SUMMARY

Applicant:	Ralph J. Duffie, Inc.
LMA No. & Date of Filing:	G-826, filed July 22, 2004
Zoning and Use Sought:	Zone: O-M Use Sought: Office Buildings, Moderate Intensity
Current Zone and Use:	Zone: C-1 Current Use: Office Building and Vacant Restaurant;
Location:	10001 New Hampshire Avenue and 1701 to 1729 Elton Road, Silver Spring
Applicable Master Plan:	<i>1997 White Oak Master Plan</i>
Acreage to be Rezoned:	Approximately 2.8222 acres (122,821 sq. ft.)
FAR Permitted in O-M Zone:	FAR 1.5
FAR Planned:	FAR \leq 1.4 on Parcel 18; FAR = .33 on Parcel 23
Bldg. Coverage Allowed/Planned:	60% Maximum / \leq 40% planned on Parcel 18; 18% on Parcel 23
Green Space Required/Planned:	10% Minimum / \geq 20% planned on Parcel 18; 15.9% on Parcel 23
Parking Spaces Required/Planned:	244 Required for Parcel 18 / \geq 250 planned; 61 Required for Parcel 23 / 100 planned
Building Height Limits:	5 stories Maximum / \leq 5 stories planned on Parcel 18; 2 on Parcel 23
Traffic Issues:	See Neighborhood Response, below
Storm Water Drainage:	Storm water management will be provided on site, and plans will be finalized at Site Plan and Subdivision Review
Environmental Issues:	None.
Consistency with Master Plan:	Project is consistent with the commercial use recommendation of the Master Plan, although the Plan does not specifically recommend the O-M Zone
Neighborhood Response:	There is no opposition, although both the Hillandale Citizens Association, by letter (Exhibit 42) and neighbor Eileen Finnegan, by testimony, requested an updated traffic study and possibly additional traffic mitigation measures. Labquest, a community organization supporting the FDA's relocation to the area also supports the subject application
Planning Board Recommends:	Approval
Technical Staff Recommends:	Approval
Hearing Examiner Recommends:	Approval

II. STATEMENT OF THE CASE

Application No. G-826, filed on July 22, 2004, by Applicant Ralph J. Duffie, Inc., requests a Local Map Amendment (LMA) reclassifying 2.8222 acres (122,821 square feet) of land formed by two adjacent lots from the existing C-1 Zone (convenience/commercial) to the O-M Zone (office building/moderate intensity). The two lots are Parcel 18, which is 1.3822 acres located at 10001 New Hampshire Avenue and Parcel 23, which is 1.44 acres located at 1701 to 1729 Elton Road; both near the southeast corner of the intersection of New Hampshire Avenue and Elton Road, in Silver Spring. The site is across from the Hillandale Shopping Center, and just north of the northbound exit ramp for Exit 28 and Interstate 495 (*i.e.*, the Beltway). The Tax Account Nos. are 05-00257967 for Parcel 18 and 05-03263783 for Parcel 23.

The application was filed under the Optional Method authorized by Code § 59-H-2.5, which permits the filing of a Schematic Development Plan (SDP), containing binding limitations with respect to land use, density and development standards or staging. Applicant proposes to retain the two story office building and parking on Parcel 23 and to demolish the vacant, one story restaurant on Parcel 18 and replace it with an office building of five stories or less.

The application was reviewed by Technical Staff of the Maryland-National Capital Park and Planning Commission (“M-NCPPC”) who, in a report dated January 21, 2005 (Exhibit 38)¹, recommended approval of the rezoning on grounds that the application meets the purpose and other requirements of the O-M zone, is compatible with the surrounding area and is in the public interest.² The Montgomery County Planning Board (“Planning Board”) considered the application on January 27, 2005 and unanimously voted to recommend approval, as stated in the Board’s Memorandum of February 8, 2005 (Exhibit 40(a)).

¹ A corrected version of the Technical Staff Report added new item 1a on page 1 (“a. The application meets the purpose of the O-M zone); renumbered prior items 1a, b, & c to 1b, c, & d; and on page 10, changed the date 1/24/05 to 1/20/05.

² The Technical Staff Report is quoted and paraphrased frequently herein.

A public hearing was convened on February 11, 2005, at which time the Applicant presented evidence and testimony in support of the application. There was no opposition testimony from the community, although one neighbor, Eileen Finnegan, testified that an updated traffic analysis was needed. She also sent a letter to the Planning Board raising this traffic issue and questioning the need to rezone Parcel 23. On the support side, the Hillandale Citizens Association characterized the project as “desirable,” but also asked for an updated traffic analysis (Exhibit 42). Further support took the form of a letter from Labquest, a community organization assisting the FDA’s relocation to the area (Exhibit 41). Martin Klauber, the People’s Counsel, participated in the hearing and supported the application, but did not call any witnesses. Technical Staff testified at the request of the Applicant to explain why the traffic study in the record should not be updated.

The hearing was completed on February 11, 2005, and the record was held open until March 11, 2005, so that Applicant could submit a revised SDP and related plans and covenants, and to give Technical Staff an opportunity to review these submissions. Applicant filed the revised exhibits and additional materials on March 7, 2005 (Exhibit 62 and subparts); Technical Staff filed no additional evaluations. The record closed, as scheduled, on March 11, 2005.

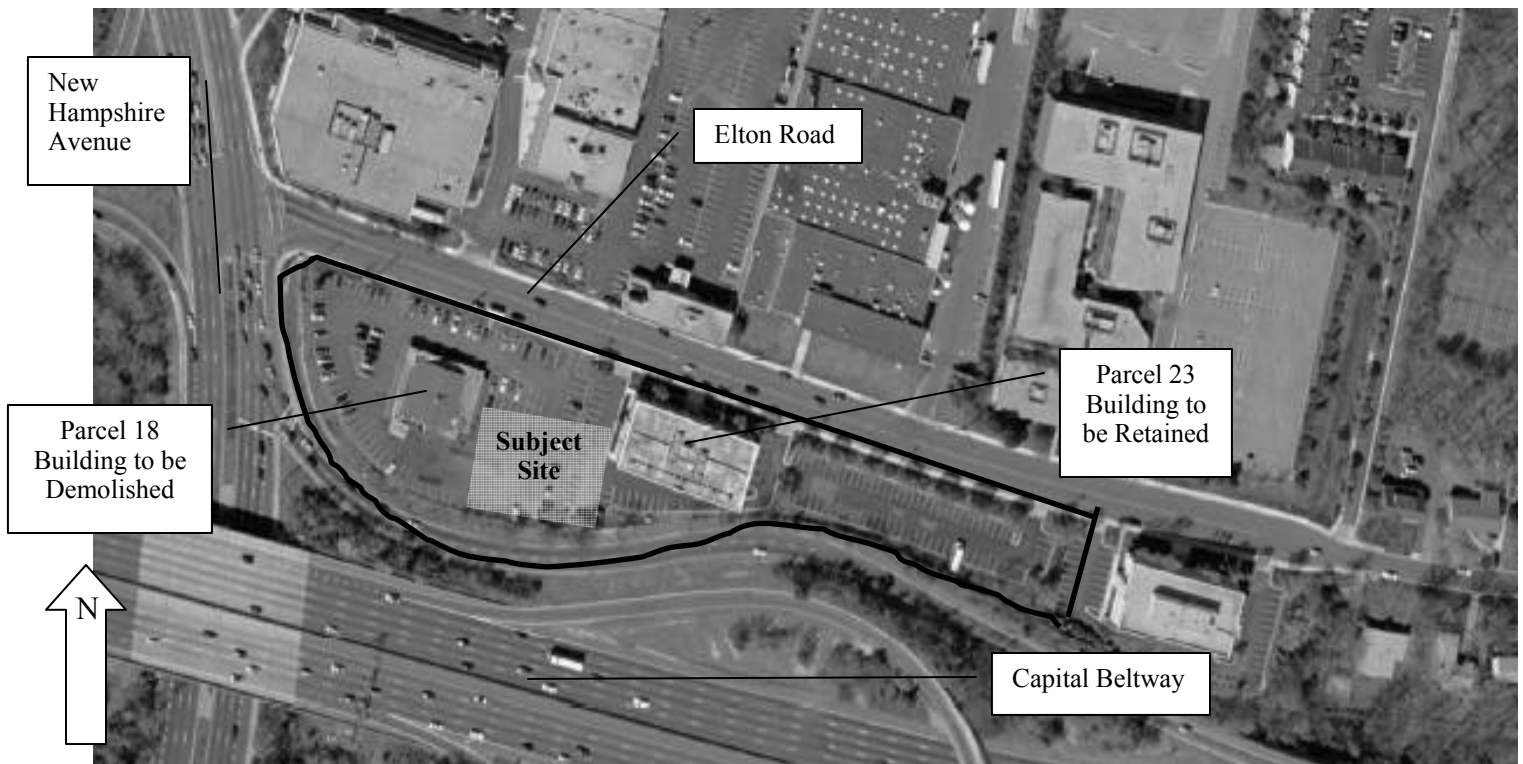
III. FINDINGS OF FACT

A. Subject Property

The subject site, which is owned by the Applicant, is located near the intersection of New Hampshire Avenue and Elton Road, in Silver Spring, adjacent to the Capital Beltway ramp for Exit 28. Two adjacent parcels comprise the subject property, Parcel 18, a corner lot which has a New Hampshire Avenue address and 341 feet of frontage along Elton Road, and Parcel 23, which has 336.51 feet of frontage on Elton Road. The eastern edge of Parcel 23 is just 600 feet from the Prince George’s County boundary.

Parcel 18 consists of 1.3822 acres (60,218 square feet) and Parcel 23 consists of 1.44 acres

(62,603 square feet). Both are irregularly shaped and nearly flat, with a gentle east to west slope toward New Hampshire Avenue. Parcel 18 is developed with a vacant, one-story building (most recently operated as a Shoney's Restaurant), and outdoor parking, and Parcel 23 is developed with an occupied two-story office building, also with outdoor parking. See aerial photo (Exhibit 45):

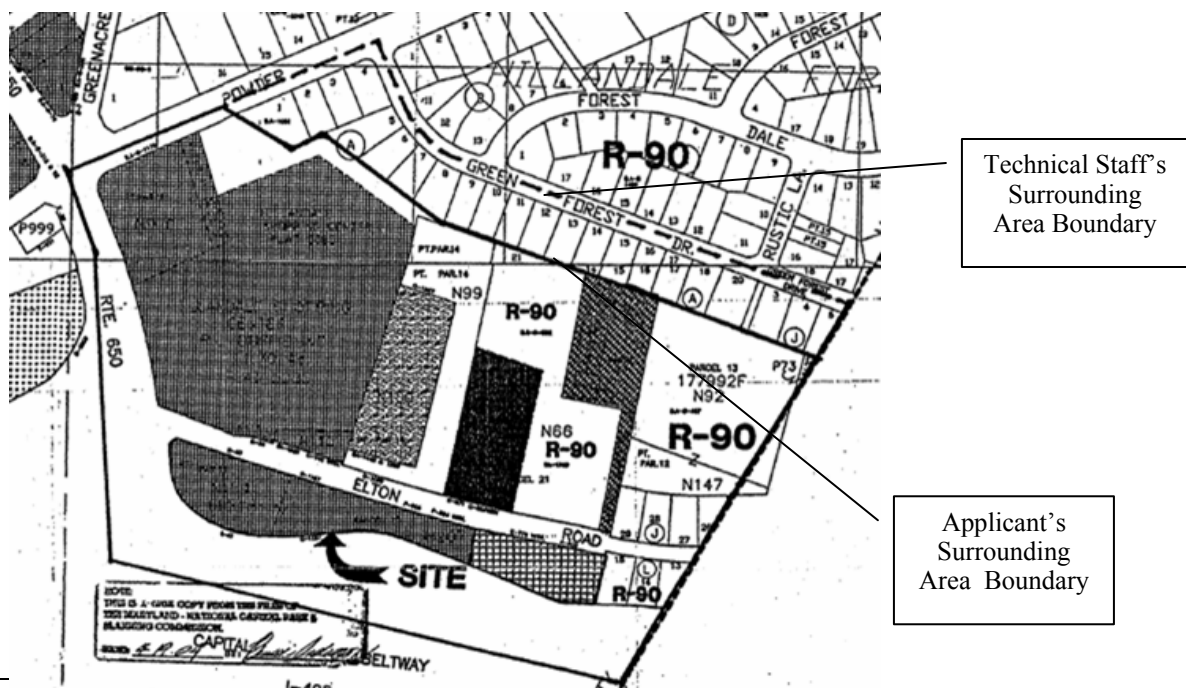


The Schematic Development Plan (Exhibit 62(a)) proposes to demolish the vacant building on Parcel 18 and replace it with a five-story, “high quality” office building. This application does not propose any modification to Parcel 23 or its improvements. The Elton Road elevation of the existing building on Parcel 23, which will be retained, is depicted below (Exhibit 36(l)):



B. Surrounding Area

The surrounding area must be identified in a floating zone case so that compatibility can be evaluated properly. The “surrounding area” is defined less rigidly in connection with a floating zone application than in evaluating a Euclidean zone application. In general, the definition of the surrounding area takes into account those areas that would be most directly affected by the proposed development. Technical Staff recommends describing the surrounding area as bounded by I-495 to the south, New Hampshire Avenue to the west, Powder Mill Road to the north, Green Forest Drive to the northeast, and Wooded Way to the east, which description includes a portion of Prince George’s County. Applicant’s land use expert, Les Powell, opined that the surrounding area should stop at the Prince George’s County line and should not have included the single-family homes to the south of Green Forest Drive, which he would have excluded because the topography and intervening commercial buildings make the impact of the proposed rezoning inconsequential to those single-family homes. Tr. 26-30. The differing definitions can be seen in the certified Zoning Map, Exhibit 49 (Dotted line shows Technical Staff’s boundary; Solid line shows Applicant’s):³



³ The certified Zoning Map erroneously identifies Parcel 23 as part of Parcel 20, even though Parcel 23 was created as a separate parcel by a minor subdivision in 1999 (Platt Number 21097).

Based on the discussion at the hearing, the Hearing Examiner finds that Technical Staff's northern boundary line should be accepted, while their suggestion of including a sliver of Prince George's County should be rejected. Neither Applicant nor People's Counsel object to this description of the surrounding area, which is as depicted above, including the area south of the dotted line. Tr. 29-30. The general vicinity can be seen on the Planimetric Vicinity Map attached to the Technical Staff report:



Adjoining the subject site to the south is the exit ramp of I-495. Adjoining Parcel 23 to the east is a three-story office building, also owned by the Applicant, and zoned C T (Commercial, Transitional). Confronting the properties to the north are the Hillandale Shopping Center, zoned C-1; a bank, zoned C-1; a Coca Cola plant, zoned I-1 (light industrial); and a complex of office buildings from one to three stories, zoned C-O (commercial, office building) .

The boundaries of the “surrounding area” in which the Subject Property is located coincide, for the most part, with what the White Oak Master Plan describes (Figure 19 on page 35) as the “Hillandale Commercial Center,” except our defined surrounding area also includes the residences south of Green Forest Drive. The Hillandale Commercial Center is an existing commercial center that includes a local shopping center with a variety of retail commercial uses, several office buildings, and a plant facility operated by Coca Cola Enterprises, Inc. In addition to the single-family residences north of the commercial center, there are seven single-family detached dwellings and a cluster of townhouses on Avenel Gardens Lane to the east of the Subject Property, along Elton Road, just inside the Montgomery County Line.

As noted in Applicant’s Planning and Engineering Report (Exhibit 59(a), the predominant zoning in the surrounding area is non-residential. “The Coca-Cola Bottling Company property on the north side of Elton Road [*i.e.*, confronting the subject site] is zoned I-1, and the office building adjacent to the Coca Cola property is zoned C-O. Retail commercial and general office uses predominate with over 15 acres of C-1 zoned and developed land on both sides of Elton Road and approximately 1.12 acres of land classified in the C-T Zone, on the south side of Elton Road, east of the Subject Property.

The off street parking for both the I-1 Coca Cola property and the adjacent C-O office building is located on R-90 zoned land by Special Exception. A townhouse rental community, in the R-T Zone and owned by the Applicant, separates the C-O zoned office building, and its

appurtenant parking, from the single-family detached homes in the R-90 Zone on the north side of Elton road adjacent to the Prince George's County line. On the south side of Elton Road there are three R-90 zoned single-family homes between the C-T zoned office building on Parcel 24 and the Prince George's County line. Exhibit 59(a), pages 7-8.

The Green Forest Drive community is separated from the Subject Property by commercial uses that front on and have access to Elton Road. Applicant argues in its Engineering and Planning Report that the residential development on Green Forest Drive is sufficiently isolated from the Subject Property so as to be "unaffected" by the proposed new office building on Parcel 18. The Hearing Examiner views these properties as unaffected from a visual standpoint; however, they have been included in the "surrounding area" because they may be affected, albeit minimally, by traffic generated by the proposed new building.

Opposite the subject site, on the west side of New Hampshire Avenue but outside the defined surrounding area, is the George Meany Center, a labor relations college operating by special exception on land zoned R-90, and the Holly Hall Apartments for senior citizens, on land zoned R-20.

C. Zoning History

The subject property was classified in the R-90 Zone by the 1954 Countywide comprehensive zoning, and that zone was reaffirmed by the 1958 Countywide comprehensive zoning. The property now described as Parcel 23 was rezoned from R-90 to C-1, in part, in 1964, by LMA C-1187, and in part, in 1973, by LMA F-904. The property now described as Parcel 18 was rezoned from R-90 to C-1, in part, in 1964, by LMA C-1187, and in part, in 1965, by LMAs E-40 and E-41. Subsequent Sectional Map Amendments (SMAs) affecting these parcels – SMA G-337 for Eastern Montgomery County on March 16, 1982 and SMA G-746, for White Oak, on July 8, 1997 – all left the current C-1 Zone unchanged.

D. Proposed Development

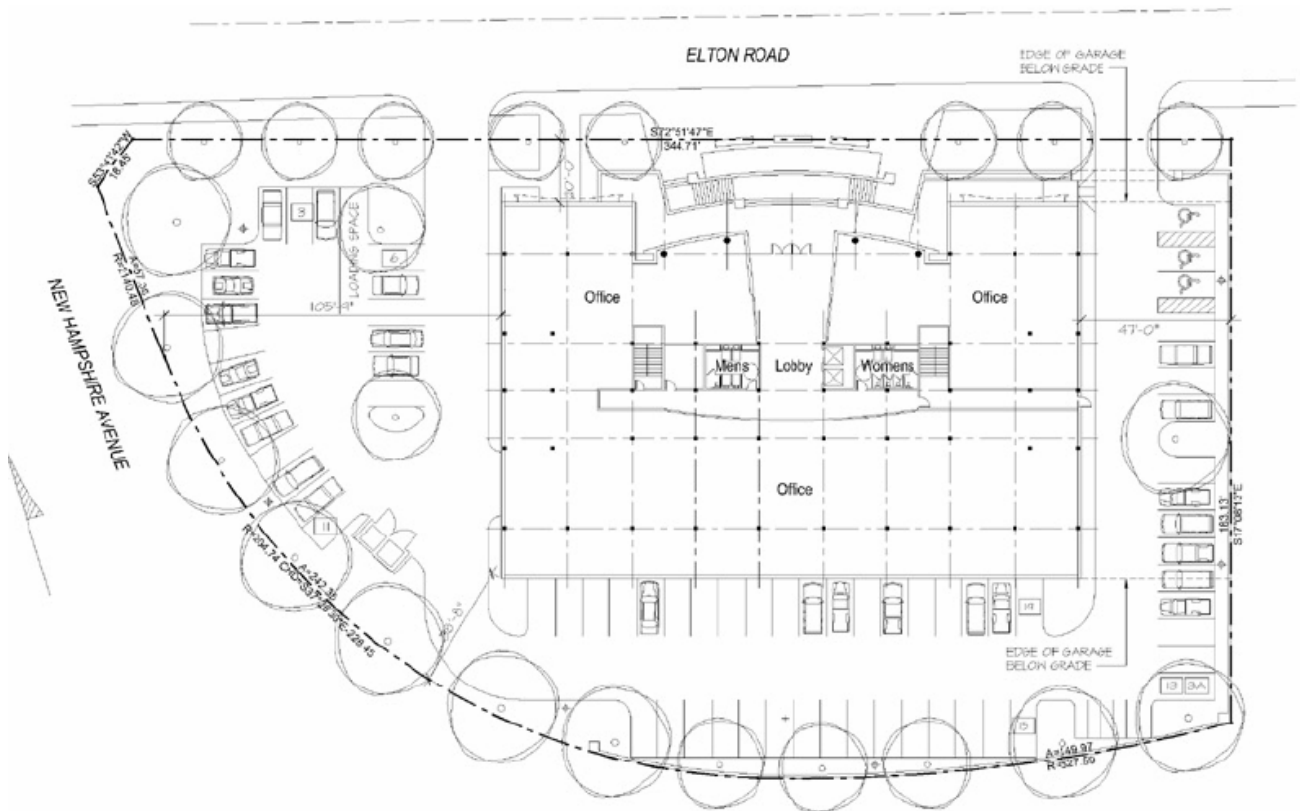
The Applicant seeks to have the subject site reclassified from its current C-1 Zone to the O-M Zone so that it can demolish the existing vacant restaurant on Parcel 18 and replace it with a five-story, “Class A” office building that will be “a visual asset from the Capital Beltway.” Tr. 15. According to Les Powell, Applicant’s land planner, a “Class A” building is one which is attractive and offers benefits that command higher rentals. Tr. 76-77. This application does not propose any modification to Parcel 23 or its current improvements; however, Applicant feels that both parcels meet the purposes and standards of the O-M Zone. The existing building on Parcel 23 is 27.5 feet in height with a Floor Area Ratio (“FAR”) of .33. It is depicted on page 6 of this report.

Applicant’s concept of the proposed five story building is shown in Exhibit 45:



This design is illustrative at this stage since selection of building materials and final architecture are not yet complete. The proposed office building will be known as “10001 New Hampshire Avenue.” Applicant intends for it to be “a key visual element along the New Hampshire Avenue corridor and serve as a gateway to Eastern Montgomery County.” Exhibit 59(a), page 10.

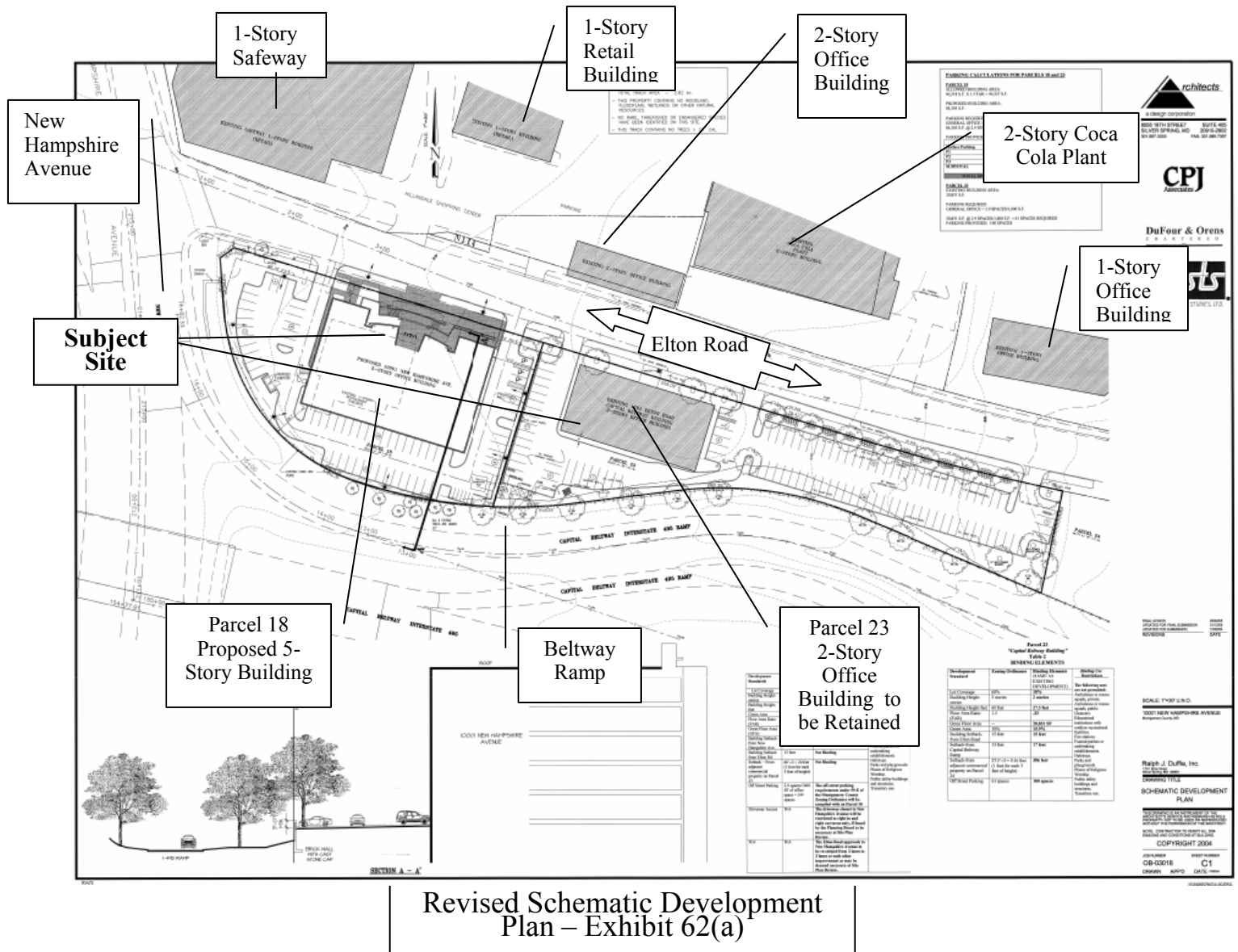
The building is currently planned for 84,305 square feet of floor space for the general office uses that are permitted in the O-M Zone. Exterior surface parking will be provided at grade, and additional parking will be provided in an underground garage. Another illustrative view of the planned building is shown in the at-grade portion of the Site Layout, Exhibit 62(c).



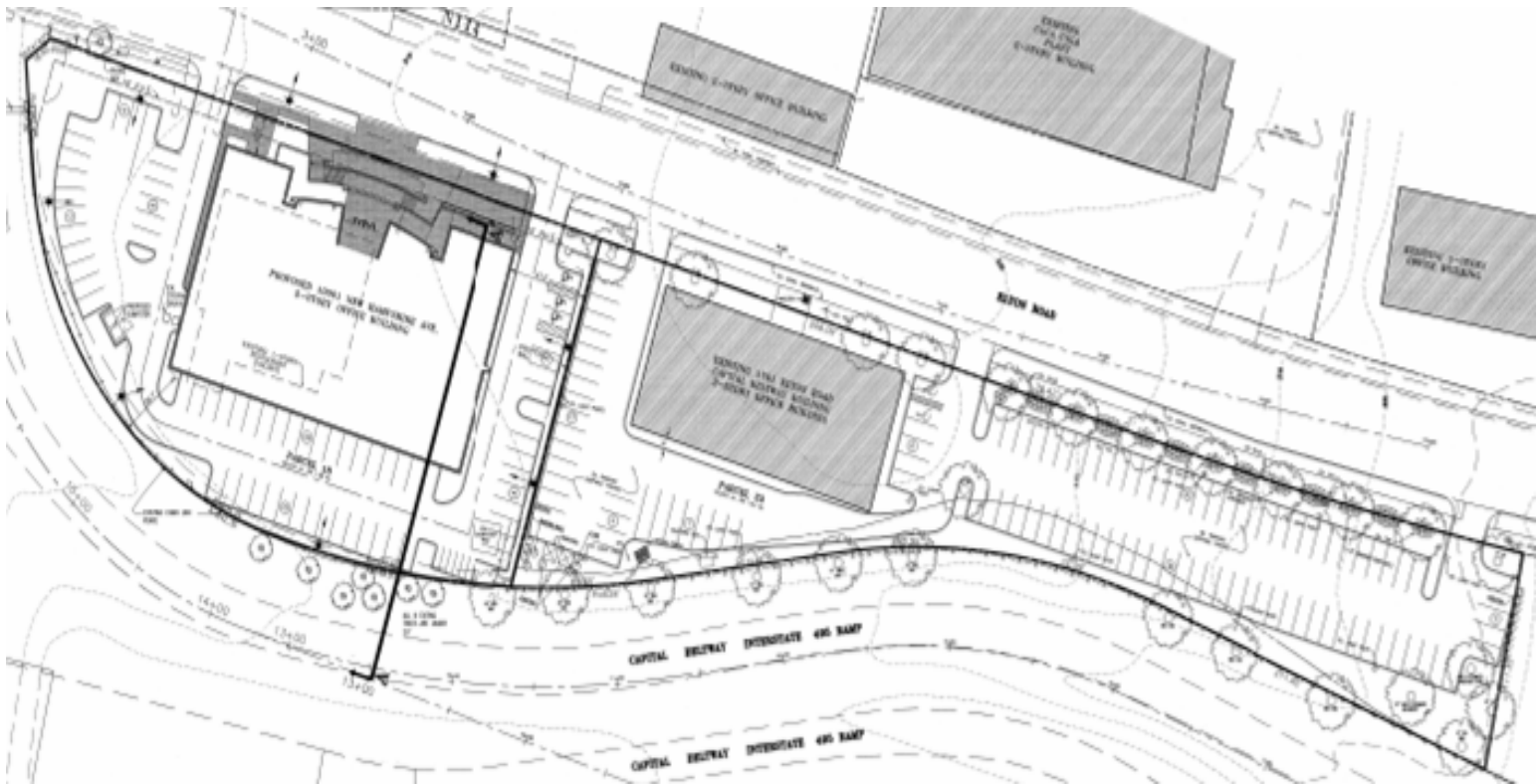
The structure will be approximately sixty (60') feet high, and its lobby will face Elton Road. As noted by Applicant, this arrangement will provide continuity with the other two existing office buildings on the same side of the street. Nevertheless, Applicant observes, “[t]he building’s orientation toward both New Hampshire Avenue and Elton Road provides connectivity within the Hillendale [Commercial] Center.”

E. Schematic Development Plan and Binding Elements

Pursuant to Code § 59-H-2.52, the Applicant in this case has chosen to follow the “optional method” of application. The optional method requires submission of a schematic development plan that specifies which elements of the plan are illustrative and which are binding, *i.e.*, elements to which the Applicant consents to be legally bound. The revised SDP (Exhibit 62(a)) is shown below:



This reduced copy is, unfortunately, too small to see any details, but a more revealing view can be seen on the reproduction, shown below, of the illustrative graphic portion of the revised SDP (Exhibit 62(a)):



In addition to the illustrative graphic on the SDP, there are boxes setting forth the “Binding Elements” for each Parcel. Those elements designated by the Applicant as binding must also be set forth in a Declaration of Covenants to be filed in the county land records if rezoning is approved. The Applicant has filed the required Declaration of Covenants in the administrative record of this case as Exhibit 60.

The legal effect of the covenants is to obligate any future owner of the property to comply with the binding elements specified on the SDP. Thus, the optional method allows an applicant to specify elements of its proposal that the community, reviewing agencies and the District Council can rely on as legally binding commitments. Illustrative elements of the SDP may be changed during site plan review, but the binding elements cannot be changed without a separate application to the District Council for a development plan amendment.

The Binding Elements set forth on the SDP are shown below:

Parcel 18
“10001 New Hampshire Avenue”
Table 1
BINDING ELEMENTS

Development Standards	Zoning Ordinance Requirements	Binding Elements	Binding Use Restrictions
Lot Coverage	60%	Not greater than 40%	The following uses are not permitted: Ambulance or rescue squads, private. Ambulance or rescue squads, public. Chancery. Educational institutions with outdoor recreational facilities. Fire stations. Funeral parlors or undertaking establishments. Helistops. Parks and playgrounds. Places of Religious Worship. Public utility buildings and structures. Transitory use.
Building Height-stories	5 stories	Not greater than 5 stories	
Building Height-feet	60 feet	Not greater than 60 feet	
Green Area	10%	Not less than 20%	
Floor Area Ratio (FAR)	1.5	Not greater than 1.4	
Gross Floor Area (GFA)	--	Not greater than 84,305 SF	
Building Setback-from New Hampshire Ave.	15 feet	Not Binding	
Building Setback from Elton Rd.	15 feet	Not Binding	
Setback – From adjacent commercial property on Parcel 23	60' ÷ 3 = 20 feet (1 foot for each 3 feet of height)	Not Binding	
Off Street Parking	2.9 spaces/1000 SF of office space = 244 spaces	The off-street parking requirements under 59-E of the Montgomery County Zoning Ordinance will be complied with on Parcel 18	
Driveway Access	N/A	The driveway closest to New Hampshire Avenue will be restricted to right in and right out turns only, if found by the Planning Board to be necessary at Site Plan Review.	
N/A	N/A	The Elton Road approach to New Hampshire Avenue to be re-stripped from 2 lanes to 3 lanes or such other improvement as may be deemed necessary at Site Plan Review.	

Parcel 23
“Capital Beltway Building”
Table 2
BINDING ELEMENTS

Development Standard	Zoning Ordinance	Binding Elements (SAME AS EXISTING DEVELOPMENT)	Binding Use Restrictions
Lot Coverage	60%	18%	The following uses are not permitted: Ambulance or rescue squads, private. Ambulance or rescue squads, public. Chancery. Educational institutions with outdoor recreational facilities. Fire stations. Funeral parlors or undertaking establishments. Helistops. Parks and playgrounds. Places of Religious Worship. Public utility buildings and structures. Transitory use.
Building Height- stories	5 stories	2 stories	
Building Height-feet	60 feet	27.5 feet	
Floor Area Ratio (FAR)	1.5	.33	
Gross Floor Area	--	20,831 SF	
Green Area	10%	15.9%	
Building Setback- from Elton Road	15 feet	15 feet	
Setback-from Capital Beltway Ramp	15 feet	17 feet	
Setback-from adjacent commercial property on Parcel 24	27.5' ÷ 3 = 9.16 feet (1 foot for each 3 feet of height)	386 feet	
Off Street Parking	61 spaces	100 spaces	

In a floating zone case, the application must be evaluated in light of all the uses permitted in the requested zone, to which the property could reasonably be put, other than uses that are restricted by an SDP. *See Wheaton Moose Lodge v. Montgomery Co.*, 41 Md. App. 401, 418-420, 397 A.2d 250 (1979). Although Zoning Ordinance § 59-C-4.2 permits many uses by right or by special exception in the O-M Zone, it is likely that some of those uses would not be feasible with the building size limitation imposed by the amended SDP and for other reasons inherent in the particular location. However, Applicant has simplified the proof required in this case by setting forth, in addition to Binding Elements regarding development standards and parking,

“Binding Use Restrictions,” as is permitted under the “Optional Method.” These can be found in the right-hand columns in the two Binding Elements charts, above.

Moreover, there was unrebutted expert testimony from Mr. Powell that the most intense use of the office building property would be to establish a restaurant on the premises, in addition to the intended general office use, and in his opinion sufficient parking would still be provided, and the use would still be compatible with surrounding uses. Tr. 67-74. His opinion was supplemented by Technical Staff, who reported that “transportation staff noted that an office building with restaurant at this site . . . would probably be the most intense generator of peak hour trips of all uses within the O-M zone.” Exhibit 38, page 11. Accordingly, the impacts of the proposed rezoning were evaluated based on the most intensive use that is permitted and feasible, which is an office building with a restaurant, and the preponderance of the evidence is that the use would be compatible with the surrounding area.

In addition to the Binding Element boxes on the SDP, there is a box labeled “General Notes,” and one labeled “Parking Calculations for Parcels 18 and 23.” Some of these items are also included in the binding elements, while others are subject to revision at site plan, a process which is contemplated under the optional method:

GENERAL NOTES

EXISTING ZONE : C1

TOTAL TRACK AREA — 2.82 Ac.

- THIS PROPERTY CONTAINS NO WOODLAND, FLOODPLAIN, WETLANDS OR OTHER NATURAL RESOURCES.
- NO RARE, THREATENED OR ENDANGERED SPECIES HAVE BEEN IDENTIFIED ON THIS SITE.
- THIS TRACK CONTAINS NO TREES > 24” CAL.

PARKING CALCULATIONS FOR PARCELS 18 and 23**PARCEL 18**

ALLOWED BUILDING AREA:

60,218 S.F. X 1.5 FAR = 90,327 S.F.

PROPOSED BUILDING AREA:

84,305 S.F.

PARKING REQUIRED

GENERAL OFFICE = 2.9 SPACES/1,000 S.F.

84,305 S.F. @ 2.9 SPACES/1,000 S.F. = 244 SPACES REQUIRED

PARKING PROVIDED: 250 SPACES

	H/C	Reg.
Surface Parking	3	67
P1	6	55
P2	---	72
P3	---	47
SUBTOTAL	9	241
TOTAL SPACES:		250

PARCEL 23

EXISTING BUILDING AREA:

20,831 S.F.

PARKING REQUIRED

GENERAL OFFICE = 2.9 SPACES/1,000 S.F.

20,831 S.F. @ 2.9 SPACES/1,000 S.F. = 61 SPACES REQUIRED

PARKING PROVIDED: 100 SPACES

The Applicant in the present case has proposed binding elements which limit development on Parcel 18 to a maximum of a five story building, with a maximum height of 60 feet, maximum building coverage of 40%, a gross floor area not exceeding 84,305 square feet, a Floor Area Ratio (FAR) no greater than 1.4, a minimum of 20% green area, compliance with the off-street parking requirements of Zoning Ordinance §59-E, restricting the driveway closest to New Hampshire

Avenue to “right-in” and “right-out” turns only (if found by the Planning Board to be necessary at Site Plan Review) and re-striping the Elton Road approach to New Hampshire Avenue from 2 lanes to 3 lanes (or such other improvement as may be deemed necessary by the Planning Board at Site Plan Review). As to parcel 23, Applicant has proposed binding elements which restrict the development to the existing improvements.

F. Master Plan

The subject site is within the area covered by the *White Oak Master Plan, Approved and Adopted in 1997*. The area encompassed by the Master Plan is divided analytically into three areas, the communities of Colesville, White Oak and Hillandale (page 9). The subject site is located in the “Hillandale” community (page 10). The Master Plan does not specifically recommend a change in the current C-1 zoning; its Land Use Plan does, however, support continuing the current “Commercial/Office” land use on the subject site (page 25).

The Master Plan is a guide, and compliance with its recommendations is not mandatory unless the Zoning Ordinance makes it so. See *Richmarr Holly Hills, Inc. v. American PCS, L.P.*, 117 Md. App. 607, 635-636, 701 A.2d 879, 893, n.22 (1997). Since the provisions of the O-M Zone (Zoning Ordinance §§59-C-4.31, *et seq.*) do not require compliance with the Master Plan, the question of whether or not to reject a requested reclassification due to inconsistency with a part of the Master Plan becomes a policy issue more than a legal question. An affirmative vote of 6 members of the Council is not required under Zoning Ordinance §59-H-8.2(b), because the Planning Board recommended reclassification in this case.

The Master Plan includes the subject site within the “Hillandale Commercial Center” depicted in Figure 19 on page 35 of the Plan, and described, as follows:

The Hillandale Commercial Center is primarily a local, retail center with a significant amount of office use. . . . The center is 31.4 acres in size and has approximately 523,460 square feet of development. There is little opportunity for growth in this center, although redevelopment of older office

and retail buildings may occur. This center has over 15 acres of C-1 (convenience commercial) zoning. [Emphasis supplied]

M-NCPPC's Community-Based Planning Staff notes that Figure 19 in the Master Plan designates New Hampshire Avenue and Elton Road as a "Gateway Location." In Staff's opinion, "[t]he proposed office building, at this location, will serve as a 'gateway' to Hillandale." Most importantly, the proposed use is consistent with the land use recommended by the Master Plan. Figure 14 on page 25. Community-Based Planning Staff opined that the proposed use would be "consistent with the recommendations of the White Oak Master Plan and is compatible with the existing 1 to 3 story buildings and uses in the Hillandale commercial area."

Applicant notes that the White Oak Master Plan "encourages development in commercial centers that will strengthen their function and sense of place." Master Plan, Page xii and Exhibit 59(a), page 8.

The Hearing Examiner finds that the subject proposal is consistent with the Land Use Plan and the goals of the Master Plan. In the opinion of the Hearing Examiner, the fact that the Master Plan called for retention of the current C-1 commercial zoning is of no moment here since the proposed O-M commercial zoning will meet the Master Plan's objectives and Land Use Plan.

G. Special Regulations and Development Standards of the Zone

Special regulations for the O-M Zone are spelled out in Zoning Ordinance §§ 59-C-4.310 through 4.314, beginning with the stated "Purpose" of the Zone in §59-C-4.310. The issue of whether the subject application comports with the purpose of the O-M Zone is discussed later, in Part V.A. of this report. We turn now to the other regulations of the Zone.

The development standards for the O-M Zone are spelled out in Zoning Code Sections 59-C-4.311 through 4.314. The Applicant has requested reclassification from the C-1 Zone to the O-

M Zone to permit construction of a five-story office building on Parcel 18. There are no plans at this time to make any changes to Parcel 23.

The development standards set forth in the Zoning Ordinance are compared with those provided by the Applicant in the chart below:

Development Standards	Required/Allowed	Provided in Parcel 18	Provided in Parcel 23
Lot Coverage	60% maximum	$\leq 40\%$	18%
Building Height	5 stories (60 ft) maximum	≤ 5 stories (60 ft)	2 stories (27.5 ft)
Green Area	10% minimum	$\geq 20\%$	15.9%
Floor Area Ratio (FAR)	1.5 FAR maximum	≤ 1.4 FAR	.33 FAR
Setback – from New Hampshire Ave	15 feet	~ 105 feet*	Not applicable
Setback - from Elton Road	15 feet	~ 20 feet*	15 feet
Setback - from Beltway Ramp	15 feet	~ 38.7 feet*	17 feet
Setback – of Proposed Parcel 18 Building from Adjacent Parcel 23 Commercial Property Lot Line	(1 foot for each 3 feet of height) $60 \div 3 = 20$ feet	~ 47 feet*	Not applicable
Setback – of Existing Parcel 23 Building from Adjacent Parcel 24 Commercial Property Lot Line	(1 foot for each 3 feet of height) $27.5 \div 3 = 9.16$ feet	Not applicable	386 feet
Off Street Parking	(2.9 spaces per 1000 sq.ft. of office space) Parcel 18 = 244 spaces Parcel 23 = 61 spaces	Whatever is required by Zoning Ordinance §59-E	100 spaces

* The asterisked setbacks are not binding because the building is still in the design stage. The 105 foot setback from New Hampshire Avenue and the 20 foot setback from Elton Road were testified to by Les Powell (Tr. 55), and the 38.7 foot setback from the Beltway, as well as the 47 foot setback from Parcel 23, are shown on the SDP illustrative Diagram. All four figures also appear on the illustrative Site Layout (Exhibit 62(c)).

As is evident, the application meets all the specific requirements of the O-M Zone; nevertheless, in addition to the local map amendment procedures, the proposed use of the subject property will require a later approval of a Site Plan by the Montgomery County Planning Board, as set forth in division 59-D-3 of the Zoning Ordinance.

H. Public Facilities

Under the County's Adequate Public Facilities Ordinance ("APFO," Code §50-35(k)), an assessment must be made as to whether the transportation infrastructure, area schools, water and sewage facilities, and police, fire and health services will be adequate to support a proposed development, and in turn, whether the proposed development will adversely affect these public facilities. Both the Planning Board and the Council have roles to play in this assessment process. The Planning Board reviews the adequacy of public facilities at subdivision, under parameters that are set by the County Council in the Annual Growth Policy ("AGP") and biennially in the two-year AGP Policy Element. While the final test under the APFO is carried out at subdivision review, the District Council must first make its own evaluation as to the adequacy of public facilities in a rezoning case because the Council has the primary responsibility to determine whether the reclassification would be compatible with the surrounding area and would serve the public interest. The Council's evaluation of public facilities at the zoning stage is particularly important because of the discretionary nature of the Council's review and the fact that the scope of Council's review is much broader at the zoning stage than that which is available to the Planning Board at subdivision, a process designed to more intensively examine the "nuts and bolts" of public facilities.

1. Transportation

Under the 2003-05 AGP Policy Element, as of July 1, 2004 subdivision applications are subject only to Local Area Transportation Review ("LATR") requirements.⁴ LATR generally involves a traffic study intended to evaluate whether a proposed development would result in unacceptable congestion during the peak hour of the morning and evening peak periods. An LATR

⁴ The Policy Area Transportation Review (PATR) was eliminated by the Council in the FY 2003-05 Policy Element of the new AGP, effective July 1, 2004, and the PATR will therefore not be considered in this report.

traffic study is required when a proposed development would generate 30 or more peak-hour automobile trips.⁵

Applicant's traffic engineering expert, Stephen Peterson, testified that using the LATR guidelines,⁶ he did a traffic analysis of the proposed office building development on June 2, 2004, and updated it on September 10, 2004 (Exhibit 31(b)). Tr. 112-114. The scope of the study was determined by the predicted number of trips the use would generate. In this case, Mr. Peterson assumed a general office use plus a restaurant on site, and he determined that the proposed use would generate 141 trips in the weekday morning peak hour and 180 trips in the weekday evening peak hour. Transportation Planning Staff report, attached to Technical Staff report, Exhibit 38. Mr. Peterson testified that the use configuration which was originally intended for the site,⁷ and upon which his traffic study was based (*i.e.*, a 90,327 square foot office building, at 1.5 FAR, and including 5,000 square feet allocated to a restaurant), would produce the "maximum [traffic] impact" for this site.⁸ Tr. 162-163. Transportation Planning Staff also felt that an office building with a restaurant at this site "would probably be the most intense generator of peak hour trips of all uses within the O-M Zone." Exhibit 38, page 11. Applicant has committed in its binding elements to a smaller building (*i.e.*, not greater than 84,305 square feet), which would reduce the number of peak hour trips below that which was indicated in the traffic study. Tr. 163.

Because the estimated number of peak hour trips generated by the new use did not exceed 250, Technical Staff required that the traffic study address the impact of the proposed use for only one intersection out in each direction from the subject site, and on the driveway at the subject site.

Pursuant to Technical Staff's direction, Mr. Peterson's traffic study also assumed that the FDA

⁵ In addition to automobile access, the subject site is served by Metrobus routes K6 and C8, and Ride-On bus routes 10, 20, 22 and 24 serve MD 650 with bus stops in the vicinity of the property.

⁶ The Hearing Examiner takes official notice of the Local Area Transportation Review (LATR) Guidelines issued by the Planning Board on July 1, 2004.

⁷ Applicant's first SDP (Ex. 4) called for a larger building than is now planned and allocation of some of the space to a restaurant. The final SDP commits to a building no larger than 5 stories, and leaves open the possibility of a restaurant.

⁸ The existing office use on Parcel 23 will remain as is, and it was therefore determined that it did not add an additional burden to the existing street traffic.

development was fully staffed at 7,700 people and took into account the commercial space in the nearby Ames store, which is currently vacant. Tr. 115-118. His traffic study concluded that the only nearby intersection that would be over the 1500 critical lane volume (CLV) prescribed for its location, assuming the most intense use, is the one at New Hampshire Avenue (MD 650) and Elton Road. That intersection showed a CLV in the p.m. peak hour of 1,539 when all existing traffic, all background traffic (*i.e.*, traffic generated by projects in the pipeline) and all traffic which the new use will generate were combined into a total figure. However, traffic mitigation measures proposed by Applicant (re-striping Elton Road)⁹ will reduce this congestion to below the acceptable level in both peak hours. Its high will be 1,465 CLV in the evening peak hour. These results are shown on the following chart from Transportation Planning Staff's report.

TABLE 2
SUMMARY OF CAPACITY CALCULATIONS
PROPOSED 90,327 SF RESTAURANT/OFFICE USES ON PARCEL 18

Intersection	Traffic Conditions							
	Existing		Background		Total		Total w/Applicant Funded Imps	
	AM	PM	AM	PM	AM	PM	AM	PM
<i>Within Silver Spring/Takoma Park Policy Area:</i>								
MD 650/Adelphi Road/Dilston Road	1,253	1,450	1,262	1,466	1,272	1,478	--	--
MD 650/Oakview Drive	1,553	1,509	1,562	1,534	1,564	1,538	--	--
<i>Within Fairland/White Oak Policy Area:</i>								
MD 650/Elton Road ¹	1,125	1,310	1,185	1,453	1,196	1,539	1,187	1,465
MD 650/Powder Mill Road ²	1,515	1,290	1,461	1,364	1,481	1,383	--	--
Elton Road/Site Driveway	--	--	--	--	1,272	1,478	--	--

Source: 10001 New Hampshire Avenue Traffic Study. STS, Ltd. June 2, 2004; Revised September 10, 2004.

Congestion Standards: Fairland/White Oak Policy Area: 1,500; Silver Spring/Takoma Park Policy Area: 1,600

¹ A November 2004 analysis of the operation of this intersection (with the same base existing traffic data) as part of the Draft SEIS for the FDA Relocation/Consolidation at White Oak indicated that the respective Background AM/PM CLV for the MD 650/Elton Road intersection were 1,489 and 1,622, respectively, because of a substantially larger study area and number of additional background developments. While this represents a higher CLV for the intersection than presented in Table 2, the traffic impact of the proposed use will still be adequately mitigated by the improvement proposed for the intersection by the applicant (since site build conditions are the same under either scenario).

² Background and Total Traffic Conditions reflect SHA improvements at the intersection as part of the MD 650 project.

⁹ The re-striping will widen the westbound Elton Road approach to the intersection from the existing 1 left turn lane and 1 left/right lane to 2 left turn lanes and 1 right turn lane.

Transportation Staff accepted the Traffic Study, noting that “the traffic study complied with the requirements of the *LATR Guidelines* and the traffic study scope provided by the staff. Traffic conditions presented in the study adequately incorporate traffic associated with identified background developments to Existing traffic, and incorporate estimated site traffic to Background (no-build) traffic to develop Total (build) traffic conditions.” Transportation Staff also observed that the State Highway Administration (SHA) had “conceptually accepted” the proposed improvement of Elton Road (*i.e.*, the re-striping) to reduce congestion at the intersection. The Applicant has made this improvement a binding element on its SDP. It has also made it a binding element that the driveway on Elton Road closest to New Hampshire Avenue will be restricted to right-in and right-out turns only, as recommended by Transportation Staff, assuming the Planning Board deems these changes necessary at Site Plan review.

Based on its review of the analysis presented in the traffic study, Transportation Planning Staff concluded that “the zoning reclassification request for the property satisfies requirements under the *LATR Guidelines* and therefore, the APF test.” The Hearing Examiner agrees; however, the traffic study issue did get more complicated at the hearing because a neighbor, Eileen Finnegan, testified that the CLV numbers used in the traffic study were not the most current available. She advocated using new CLV numbers for two critical intersections, New Hampshire Avenue at Elton Road, and New Hampshire Avenue at Powder Mill Road, as found in the FDA’s November 2004 Draft Supplemental Environmental Impact Statement “DSEIS” (Exhibit 55). Tr. 135-138, and Finnegan letter of January 20, 2005, attached to the Technical Staff report, Exhibit 38. These new numbers resulted from the FDA deciding to change the number of parking spaces it would provide for its employees. Instead of one space for every two employees, the FDA decided to supply one space for every 1.5 employees, thus increasing the number of parking spaces and potentially the number of cars making trips. Tr. 159 and 177-181.

Applicant's counsel objected to using these new figures for two reasons. Tr. 138-139. First of all, they are taken from a draft government document, not a final government document, and one cannot know at this time what the final figures will be. Secondly, using those figures would ignore the process established by the Planning Board for performing the LATR. In order to determine what that process is, Shahriar Etemadi, Supervisor of Transportation Planning Staff, and Cherian Eapen, the transportation planner who worked on this case, were called as witnesses.

According to the testimony of Shahriar Etemadi, the LATR process has a cutoff for the updating of CLV information based on proposed developments other than the Applicant's because otherwise, the fact that there is continuous development in the County would require never-ending updates. Instead, any new developers' information, submitted after the Applicant's traffic study has been filed, must be used by the new developer as a measure of the traffic they will produce (and mitigate, if excessive), rather than as pipeline background traffic. Tr. 155-156. As stated by Mr. Etemadi, "in this case, it would be FDA which is being responsible for the increasing traffic in some intersections that is not shown in this traffic [study] . . . And FDA has come after this application so this application should not be responsible for the changes that FDA is making." Tr. 157-158. That seems to the Hearing Examiner to be a fair and reasonable approach – the LATR traffic study takes a snapshot which predicts future traffic based on information available at the time; if a subsequent developer projects the creation of additional congestion, it is up to the subsequent developer to mitigate the problem.

Moreover, such mitigation measures required of the new developer might substantially reduce the CLV figures offered in the DSEIS, so the figures currently being used by Applicant may in fact accurately predict the intersections in question. Transportation Staff mentioned the DSEIS issue in footnote 1 of the Table reproduced on page 24 of this report. They rejected the new figures from the DSEIS because they were derived from a larger study area and additional

background developments. Transportation Staff added that the traffic impact of the proposed use “will still be adequately mitigated” by Applicant’s proposed improvement of the intersection. The Hearing Examiner also notes that the traffic which will actually be generated by the site will be less than that anticipated by Applicant’s traffic study because Applicant has committed to a binding element limiting the size of the building to 84,305 square feet and 1.4 FAR, smaller than the size contemplated when the traffic study was done.

Based on these considerations, the Hearing Examiner concludes that Ms. Finnegan’s proposed evidence on CLV’s should not be substituted in the LATR; nor should a new LATR study be required, because the LATR process, as explained by Transportation Staff, sensibly had to have some finality in determining traffic for which a given Applicant is responsible.¹⁰ Tr. 211-212. On the other hand, this ruling does not prevent the introduction of other evidence about traffic problems in the area of the subject site, if it is probative and otherwise admissible. In other words, the inquiry regarding traffic is not limited in a re-zoning case to the LATR, if there is other evidence establishing traffic impacts on compatibility or the public interest. *Montgomery County v. Laughlin*, 255 Md. 724, 259 A.2d 293 (1969). However, the tentative traffic estimates from the DSEIS (Exhibit 55) do not fill that bill.

It should be emphasized that the traffic estimates from the DSEIS are not being rejected just because they come from a draft government study. Government records and reports may be introduced into evidence under §10-204 of the Courts and Judicial Proceedings Article of the Maryland Code and under Rule 5-1005 of the Maryland Rules of Evidence, if they are “otherwise admissible.” The Maryland Court of Appeals held, in *Ellsworth v. Sherne Lingerie, Inc.* 303 Md. 581, 610-612, 495 A.2d 348, 363-364 (1985), that reports of government agencies are admissible, but to be admitted into evidence under the public records exception to the hearsay rule, the report

¹⁰ The DSEIS was admitted at the hearing, at People’s Counsel’s suggestion, to be given only such weight as is warranted. Tr. 207-210.

must contain reliable facts. Evaluations or opinions contained in the public report are not to be received into evidence unless they are otherwise admissible under the Maryland Rules of Evidence.¹¹

The problem with the figures in the DSEIS is that they are not reliable as the actual traffic projections for the intersections in question and are therefore not probative of issues in this case. The report itself notes that its projection assumes a “worst case scenario in terms of the anticipated traffic demand on the roadway network . . . [and that the FDA’s] TMP [*i.e.*, Transportation Management Plan] will seek to decrease the parking ratio and thus decrease the traffic demand.” DSEIS, page 4-41. Moreover, the DSEIS projections do not appear to take into account Applicant’s anticipated mitigation measures in re-striping Elton Road and any additional mitigation measures the Planning Board will seek from the FDA. Thus, it is by no means clear that the traffic demand at the intersections in question will ultimately approach the “worst case” figures suggested in the FDA report, once all required mitigation measures are instituted. Accordingly, the DSEIS figures do not establish excessive traffic at the subject intersections such that either the compatibility of the proposed project or the public interest is compromised. Since these figures also cannot be substituted for the LATR figures accepted by the Transportation Planning Staff of the M-NCPPC for the reasons previously stated, they do not tend to prove any issue germane to this rezoning case.

There was one additional issue raised by Ms. Finnegan regarding traffic – her concern about possible “cut-through” traffic to and from the subject property via the Elton Road/Wooded Way connection to Riggs Road and Powder Mill Road. Tr. 198-199. Transportation Staff reviewed this concern and concluded that “the occurrence of cut-thru traffic directly from the property through local roads, if any, would be minimal, and will not significantly affect current operation of Elton Road or Wooded Way, especially given the proximity of the property to 1-495 and MD 650.” Staff

¹¹ See also *Halliday v. Sturm, Ruger & Co., Inc.*, 138 Md.App. 136, 770 A.2d 1072, 1083-1084 (1999) and *Quinn v. Quinn*, 83 Md. App. 460, 469, 575 A. 2d 764, 768 (1990).

anticipated that “a significant amount of site traffic will utilize 1-495 and other major highways/arterials in the area to travel to and from the property, rather than the above local roads.” The Hearing Examiner has no basis for concluding that Transportation Staff is incorrect in their conclusion, and therefore accepts it.

2. Utilities

David O’Bryan, Applicant’s expert in engineering, testified that the property is served by adequate public facilities. Water and sewer services are available to both properties in Category W-1, and telephone and electricity are also available. Natural gas service is available on Parcel 18. Tr. 83.

3. Schools

Schools will not be impacted by the proposed development because there are no residential units planned.

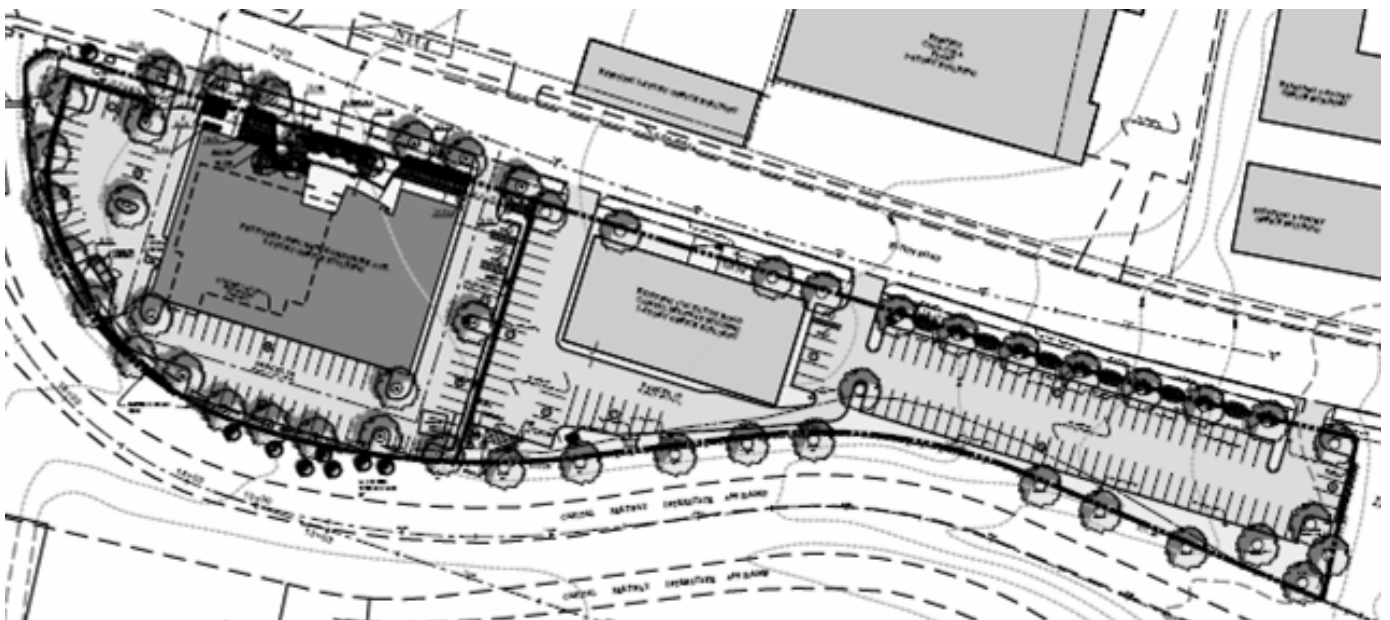
I. Environment

There are no environmental issues in this case. The subject site contains no woodland, floodplain, wetlands or other natural resources; nor have any rare, threatened or endangered species been identified. Tr. 62-63. There are also no trees exceeding 24 inches in diameter. According to Applicant’s Engineering and Planning Report (Exhibit 59(a), there are nine trees on the Subject Property, all of which have a diameter of less than twenty inches. Parcel 18 was declared to be exempt from the County’s Forest Conservation requirements because it is less than 1.5 acres in size. The official exemption notices are included in the record of this case as Exhibits 31(g), 31(h), 36(e) and 36(f).

Applicant’s engineer, David O’Bryan, testified that stormwater management plans will be submitted to DPS for approval with regard to Parcel 18. An underground storage and filtering system will likely be required for quantity and quality control. Applicant “will meet the state and

Montgomery County requirements for storm water management.” Tr. 82. There are no stormwater management problems with Parcel 23, and because it will not be physically modified, it will not need to go through any additional stormwater management reviews.

The subject property will be landscaped along all three property lines with deciduous trees in accordance with SHA and M-NCPPC guidelines, as shown in the Schematic Landscape and Lighting Plan, Exhibit 62(b), and its rendered version, Exhibit 47.



An architectural wall is proposed along the curving rear property line between Parcel 18 and the Capital Beltway ramp. Applicant states that the dual function of this proposed wall is “to both provide a screen to protect the ramp from headlights of cars in the parking lot and to establish a more attractive appearance than would be achieved by the typical chain link fence that presently separates the site from the State right of way.” Exhibit 59(a), page 9. The wall varies in height with a minimum height of 36 inches above grade on the parking lot face. Construction of the wall required a waiver of the requirements of Section 59-E-2.71 of the Zoning Ordinance, which ordinarily

requires a planting strip to separate a parking facility. On December 9, 2004, the Department of Permitting Services approved such a waiver of the requirements for the surface parking facility (Exhibit 31(d)). The Hearing Examiner agrees that, in this instance, an architectural wall located along a portion of the rear property line will screen headlights and serve as a more appropriate screen than would a ten-foot landscape strip.

There were no environmental issues raised in this case by Technical Staff's report or at the hearing. The Hearing Examiner therefore finds no adverse impact on the environment.

J. Community Concerns

Response from the community consists of three letters and testimony from one neighbor, Eileen Finnegan. There was no opposition testimony from the community, although Ms. Finnegan, testified that an updated traffic analysis was needed. She also sent a letter to the Planning Board raising this traffic issue and questioning the need to rezone Parcel 23. On the support side, the Hillandale Citizens Association characterized the project as "desirable," but also asked for an updated traffic analysis (Exhibit 42). The traffic analysis issue has been discussed at length in Part III.H.1. of this report, and the Hearing Examiner concluded that Technical Staff and Applicant had sufficiently analyzed that issue using appropriate data.

There is a letter of support for this project from Labquest, a community organization assisting the FDA's relocation to the area (Exhibit 41). Martin Klauber, the People's Counsel, participated in the hearing and supported the application, but did not call any witnesses. He also opined that the LATR procedures followed by Applicant and Transportation Planning Staff were appropriate and that the LATR traffic study should not be amended to include later figures from the DSEIS. Tr. 121.

IV. SUMMARY OF HEARING

A. Applicant's Case in Chief

1. Les Powell:

Les Powell testified as an expert in Land planning and landscape architecture. He described the subject site and the current c-1 zoning and compared Euclidian and “floating zones.” He then described “surrounding area” in a floating zone case as the neighborhood that is generally associated with the property. In this case, the neighborhood that he considered the surrounding area is bordered on the south by the Beltway, on the west by Route 650, on the north by Powder Mill Road and on the east by the Montgomery County/Prince George's County line.

Mr. Powell noted that Technical Staff extended their description of the surrounding area to include homes on the south side of Green Forest Drive. He indicated it was arguable either way, but he would have excluded those homes because the topography and intervening commercial buildings in transitional zones make the impact of the proposed rezoning inconsequential to them. Tr. 26-32.

Mr. Powell testified that the subject site met the purpose clause of the O-M Zone and explained why. Tr. 32-35. He then described the adjoining neighborhood in detail and opined that the proposed development would be compatible. Tr. 35-43. Mr. Powell listed the O-M Zone's development standards and showed that the proposed building will be within those parameters, including, *inter alia*, a 105 foot setback from New Hampshire Avenue and a 20 foot setback from Elton Road. Tr. 43-56. Mr. Powell described the binding elements listed on the SDP, and there was discussion as to how the SDP could be revised to clarify them. Tr. 56-58.

Mr. Powell further testified regarding landscaping all around the property. There are trees along Elton Road and screening walls and evergreen hedging to block the parking from Elton Road. On the western portion of the site, there are trees and “we have a 36 inch high evergreen

hedge that continues down Elton Road towards New Hampshire Avenue, turns and follows -- turns southerly and follows the curve of the on-ramp for the Beltway to a point at the back of the building, at which point we then have a 36 inch high wall that will be used to screen the oncoming headlights of cars from our site to block them from the view of the cars that are on the off ramp for the Beltway.” Tr. 58-59. A waiver of setback requirements was issued by DPS to permit the wall, since a landscape strip is ordinarily required.

Mr. Powell described the lighting for the buildings and noted that photometric studies would be submitted at site plan. Tr. 60-62. He also testified that there were no environmental issues on the property. A natural resources inventory and forest stand delineation was approved by Park and Planning. There are no rare, threatened, or endangered species on the site; nor are there any woodlands, flood plains, wetlands, or other natural features on the site. The property is exempt from reforestation requirements, and there is a letter from Park and Planning to that effect. Tr. 62-63.

In Mr. Powell’s opinion, the proposed rezoning is consistent with the White Oak Master Plan because it encourages redevelopment of some of these parcels “and obviously the existing vacant Shoney’s would be a perfect example of that.” Tr. 64. The Plan also speaks of having a gateway element at New Hampshire Avenue and the Beltway for the Hillandale neighborhood. Mr. Powell feels that “the building being proposed is a five story Class A building . . . that . . . would be an attractive gateway to this community.” Tr. 64. A “Class A” building is one which is attractive and offers benefits that command higher rentals. Tr. 76-77.

Mr. Powell further testified that there is nearby police and fire protection, and the project would put no burden on schools. He also agreed with the opinions expressed in the Technical Staff reports. Tr. 65-67. In Mr. Powell’s opinion the most intense use of the office building property would be to establish a restaurant on the premises, in addition to the intended general

office use. According to Mr. Powell, if this were done, sufficient parking would still be provided, and the use would still be compatible with surrounding uses. Tr. 67-74.

2. David O'Bryan:

David O'Bryan, Applicant's expert in engineering, testified that Stormwater Management Plans will be submitted to DPS for approval with regard to Parcel 18. An underground storage and filtering system will likely be required for quantity and quality control. Applicant "will meet the state and Montgomery County requirements for storm water management." Tr. 82. There are no stormwater management problems with Parcel 23, and because it will not be physically modified, it will not need to go through any additional stormwater management reviews.

Mr. O'Bryan further testified that the property is served by adequate public facilities. Water and sewer services are available to both properties in Category W-1, and telephone and electricity are also available. Natural gas service is available on Parcel 18. Tr. 83.

3. John Stovall:

John Stovall testified as an expert in architecture. He testified that he prepared the conceptual design for the new building proposed for Parcel 18, as depicted in Exhibit 45. Tr. 89. He described the buildings in the surrounding area, which range from one to three stories, and then described what he considered to be the features in a "Class A" building, *e.g.*, high ceilings, stainless steel elevators, bordered stone floorings, finishing and amenities, "plus the design of the building so that it's graceful to enter, it's easy to enter, people enjoy being there, they're impressed when they walk into it." Tr. 93.

The building will have a New Hampshire avenue address, but its main entrance will be on Elton Road. The entrance is set above the Elton Road level to bring another element of a main street commercial building onto the business street, which will enhance the experience of driving down Elton Road. The building is being designed to be the kind of gateway building called for in

the Master Plan. Tr. 94-95. In Mr. Stovall's opinion, this building "will transition down very nicely to the site." It will also present "a very landscaped appearance" with a five foot sidewalk, widening out into a 20 foot deep pedestrian seating plaza in front of the building that serves two gently rising and gently curved stairs that lead up to the entrance plaza to the building. Tr. 96.

Mr. Stovall further testified that the current driveways will not have to be relocated. Access has been provided all of the way around the building for convenience so that you can reach all portions of the site from either entrance. Parking will be accessed through a door on the west end of the building, and then the B lot ramps down in a circular pattern to provide 150 cars inside the building. There will be 70 parking spaces located on the site, and 150 cars located in the building of this proposed design. Handicap parking will be provided both inside and outside the building. Tr. 97. Since the building will have 84,305 square feet of office space, 244 parking spaces will be required (at 2.9 cars per thousand square feet of office space). 250 parking spaces will be provided. Tr. 99. The floor area ratio (FAR) of the building will be 1.4, and the height will be 60 feet. Tr. 100.

In Mr. Stovall's opinion, the proposed building is consistent with the general plan refinement of the goals and objectives for Montgomery County published in 1993 and the White Oak Master Plan. "[T]he whole concept blends, I think, wonderfully with this site." Tr. 101-103.

Mr. Stovall also opined that the existing 27.5 foot tall building on Parcel 23 is compatible with the surrounding area. Tr. 104. It is landscaped, hedged, and trimmed, and according to Mr. Stovall, it enhances and adds to the character of the main street, Elton Road. Mr. Stovall identified the photos in Exhibit 36(l), and stated his professional opinion that both of these buildings will be visually compatible in terms of height, bulk and size with the existing and planned uses in the surrounding area. Tr. 104-109.

4. Stephen Peterson:

Stephen Peterson testified as an expert in transportation engineering. Mr. Peterson testified that, using the LATR guidelines, he did a traffic analysis of the proposed office building development on June 2, 2004, and updated it on September 10, 2004 (Exhibit 31(b)). Tr. 112-114.

The scope of the study was determined by the predicted number of trips the use would generate during the peak hours. Because the estimated number of peak hour trips generated by the new use did not exceed 250, Technical Staff required that the traffic study address the impact of the proposed use for one intersection out in each direction from the subject site, and on the driveway at the subject site. Pursuant to Technical Staff's direction, Mr. Peterson's traffic study also assumed that the FDA development was fully staffed at 7,700 people and took into account the commercial space in the nearby Ames store, which is currently vacant. Tr. 115-118. He noted that the FDA's projections for the number of automobile trips could increase if the FDA projected more parking spaces for their employees. Tr. 131.

Mr. Peterson testified that the use configuration which was originally intended for the site, and upon which his traffic study was based (i.e., a 90,327 square foot office building, at 1.5 FAR, and including 5,000 square feet allocated to a restaurant), would produce the "maximum [traffic] impact" for this site. Tr. 162-163. Applicant has committed in its binding elements to a smaller building (i.e., not greater than 84,305 square feet), which would reduce the number of peak hour trips below that which was indicated in the traffic study. Tr. 163.

Mr. Peterson's traffic study concluded that the only nearby intersection that would be over the 1500 critical lane volume (CLV) prescribed for its location, assuming the most intense use, is the one at New Hampshire Avenue (MD 650) and Elton Road. That intersection showed a CLV in the p.m. peak hour of 1,539, when all existing traffic, all background traffic (i.e., traffic generated by projects in the pipeline) and all traffic which the new use will generate was

combined into a total figure. However, traffic mitigation measures proposed by Applicant (re-striping Elton Road to widen the westbound approach to the intersection from the existing 1 left turn lane and 1 left/right lane to 2 left turn lanes and 1 right turn lane) will reduce this congestion to below the acceptable level in both peak hours. It's high will be 1,465 CLV in the evening peak hour. Tr. 161-169.

Mr. Peterson further testified that Technical Staff's recommendation to limit turns from the driveway closest to New Hampshire Avenue to right-turn-in and right-turn-out would be appropriate Tr. 173-174.

5. Shane Pollin:

Shane Pollin testified that he is the Director of Development for Applicant. As such he coordinates the professionals working on various projects and interfaces with the community, all in an effort to move projects along. Tr. 183. Applicant owns the Hillandale Shopping Center and other property in the area, as well. Tr. 184-186.

Mr. Pollin met with architects and members of the community, including Eileen Finnegan, the Hillandale Citizens Association and Labquest,¹² in an effort to figure out what to do with the subject property, which had a deteriorating vacant building on it. Mr. Pollin also met with various leasing groups trying to get a handle on what the market would be for a building on the subject site because there isn't such a quality building in the vicinity right now. After meetings with the citizens, Applicant did its best to accommodate their desires by trying to incorporate a restaurant into an office building. Tr. 184. Unfortunately, Mr. Pollin's market research revealed that a restaurant in a suburban office building might not work out. Tr. 188.

According to Mr. Pollin, if zoning is approved, Applicant will "move as quickly as the

¹² Mr. Pollin testified that Labquest is a group whose mission is to facilitate the coming of the FDA consolidation, and he is a member of the amenities group.

process will allow us to.” Construction, following site plan and all approvals, would probably take 18 months, depending on numerous factors, including weather. Mr. Pollin testified that it is Ralph J. Duffie's intention to abide by the covenants and binding elements in this case, and the conditions of approval that are imposed at site plan. Tr. 190-192.

B. Witness from the Community

Eileen Finnegan:

Eileen Finnegan, testified that the CLV numbers used in the traffic study were not the most current available. She advocated using new CLV numbers for two critical intersections, New Hampshire Avenue at Elton Road, and New Hampshire Avenue at Powder Mill Road, as found in the FDA's November 2004 Draft Supplemental Environmental Impact Statement “DSEIS” (Exhibit 55). Tr. 135-138.

Applicant's counsel objected to using these new figures for two reasons. Tr. 138-139. First of all, they are taken from a draft government document, not a final government document, and one cannot know at this time what the final figures will be. Secondly, using those figures would ignore the process established by Technical Staff of the M-NCPPC for performing the LATR. In order to determine how that process works, Shahriar Etemadi, Supervisor of Transportation Planning Staff, and Cherian Eapen, the planner who worked on this case, were called as witnesses.

Ms. Finnegan also expressed concern about “cut through” traffic (*i.e.*, traffic taking short cuts though local roads to avoid back-ups on arterials), which she felt would be exacerbated by additional traffic from the relocated FDA and from the subject proposal. Tr. 198-199.

C. M-NCPPC Technical Staff Witness

Two members of the M-NCPPC's Transportation Planning Staff, Cherian Eapen and Shahriar Etemadi, appeared at the hearing at the Applicant's request .

1. Shahriar Etemadi:

Shahriar Etemadi testified that he is the transportation supervisor in charge of subdivision development for the M-NCPPC. He stated that the LATR process begins with a letter or a meeting with an applicant, and Transportation Planning Staff tells the applicant the scope of the required traffic study based on the Local Area Transportation Review guidelines. Based on that scope of work, the applicant prepares a traffic study and submits it to Staff, who examine it in detail and either accept or reject it. Tr. 154-155.

In this case, Transportation Planning Staff gave Applicant the scope of work in January of 2004, and also gave the Applicant the best information available at the time concerning the FDA development, so it could be incorporated into the background traffic figures to be included in this traffic study. Applicant completed the traffic study, and Staff reviewed and accepted it as complete in September of 2004. Mr. Etemadi testified that once Transportation Planning Staff accepts that traffic study, they cannot go back and change the traffic study for any applicant, including this one, based on somebody else's change in plan. They do not accept subsequent information "because if we did that we will never be able to have a final traffic study approved because at the same time we are reviewing this, or, waiting to go to the Planning Board somebody else is changing something, or, proposing something, or, bringing in another plan." Tr. 155-156.

Instead, any new developers' information, submitted after the Applicant's traffic study has been filed, must be used by the new developer as a measure of the traffic it will produce (and mitigate, if excessive), rather than as pipeline background traffic. Tr. 156. As stated by Mr. Etemadi, "in this case, it would be FDA which is being responsible for the increasing traffic in some intersections that is not shown in this traffic [study] . . . And FDA has come after this application so this application should not be responsible for the changes that FDA is making. Tr. 157-158.

The only change made by FDA was to the number of parking spaces it decided to provide for its employees. Tr. 159.

2. Cherian Eapen:

Mr. Eapen testified that he was the Transportation Planning Staff reviewer for the subject property. He found the traffic study to be complete, and recommended approval with a few conditions. Tr. 176. According to Mr. Eapen, the National Capital Planning Commission (NCPC) changed the requirements so that FDA could supply 1 parking space for every 1.5 employees, instead of 1 space for every 2 employees (*i.e.*, more parking spaces). He received this information from the FDA in April of 2004. Tr. 177-181.

D. People's Counsel

Martin Klauber, the People's Counsel, did not call any witnesses, but he did participate in the hearing, and he recommended approval of the application for rezoning. He also opined that the LATR procedures followed by Applicant and Transportation Planning Staff were appropriate and that the LATR traffic study should not be amended to include later figures from the DSEIS. Tr. 121.

V. ZONING ISSUES

Zoning involves two basic types of classifications: Euclidean zones and floating zones. The term "Euclidean" zoning arose from the seminal United States Supreme Court case upholding the land use authority of local governments, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Euclidean zoning divides the territory of a local jurisdiction into zoning districts with set boundaries and specific regulations governing aspects of land development, such as permitted uses, lot sizes, setbacks, and building height.

A floating zone is a more flexible device that allows a legislative body to establish a district for a particular category of land use, with regulations specific to that use, without attaching that district to particular pieces of property. Individual property owners may seek to have property reclassified to a floating zone by demonstrating to the Council that the proposed location satisfies the requirements and purpose clause for the zone, the development would be compatible with the surrounding area, and it would serve the public interest. *Aubinoe v. Lewis*, 250 Md. 645, 244 A.2d 879 (1967).

Montgomery County has many floating zones, including the O-M Zone. The O-M Zone contains development standards and a post-zoning review process that delegate to the Planning Board site specific issues such as building location, stormwater control, vehicular and pedestrian routes, landscaping and screening. The Council has a broader and more discretionary role in determining whether to approve a re-zoning.

When the reclassification sought by an applicant is recommended by the applicable Master Plan, approval of the rezoning by the Council requires an affirmative vote of 5 Council members; however, when the Master Plan does not recommend the reclassification sought, the Zoning Ordinance requires an affirmative vote of 6 members of the Council for approval, unless the Planning Board has recommended approval. Zoning Ordinance §59-H-8.2(b). As mentioned earlier, the *1997 White Oak Master Plan* does not specifically recommend reclassification to the O-M Zone for the subject site; however, the Planning Board recommended approval, and therefore an affirmative vote of 6 members of the Council is not required under Zoning Ordinance §59-H-8.2(b).

We turn now to the three areas of Council review discussed above, the requirements and purpose clause of the zone, compatibility with existing and planned land uses in the surrounding area, and relationship to the public interest.

A. The Zone's Requirements

The development standards for the O-M Zone are spelled out in Zoning Code Sections 59-C-4.311 through 314. The Applicant has requested reclassification from the C-1 Zone to the O-M Zone to permit construction of a five-story office building on Parcel 18 and to provide suitable zoning for Parcel 23 should Applicant decide at a later time to seek an amendment to the SDP to allow construction of a larger office building. There are no plans at this time to make any changes to the property on Parcel 23; however, it is worth noting that rezoning from the C-1 Zone to the O-M Zone will help to satisfy one of the special regulations of the C-1 Zone. Zoning Ordinance §59-C-4.341 prohibits land in the C-1 Zone from exceeding 15 acres at one location, which according to Applicant, it currently does.¹³ The subject zoning application, if granted, would remove over 2.8 acres of land from the excessive C-1 Zone in the Hillandale Commercial Center. This fact also helps to answer the question raised by Eileen Finnegan regarding the rationale for rezoning Parcel 23, given that Applicant has no immediate plans to change the existing two story office building thereon. It also makes sense to give this “gateway” area, as described in the Master Plan, the flexibility of the O-M Zone, so that at some future time, the owner of Parcel 23 can build office space even more compatible with the structure which will exist on Parcel 18, without the need for another rezoning application. The owner would, of course, have to apply for an amendment to the SDP.

The Applicant's compliance with the O-M Zone's development standards was shown in Part III. G. of this report. In addition to the local map amendment procedures, the proposed use of the subject property will require a later approval of a site plan by the Montgomery County Planning Board as set forth in division 59-D-3 of the Zoning Ordinance.

¹³ Zoning Ordinance §59-C-4.341.1 permits the C-1 area to exceed 15 acres if so recommended in the Master Plan.

B. The Purpose Clause

The purpose clause for the O-M Zone, §59-C-4.310, contains several requirements for eligibility: (1) that the property is located outside of a central business district; (2) that the property is located in an area where high intensity uses are not appropriate; (3) that the property is located where a moderate-intensity office building will not have an adverse impact on the adjoining neighborhood; and (4) that the surrounding area is not predominantly one-family residential in character.

The rezoning will satisfy the requirements of the purpose clause because: (1) the property is located outside of a central business district; (2) the property is located in an area where high intensity uses are not appropriate, given the potential for traffic congestion they would cause and given the fact that uses in the surrounding area are predominantly low and moderate intensity commercial, with a few residential uses; (3) the property is located where a moderate-intensity office building will not have an adverse impact on the adjoining neighborhood because, as noted, the neighborhood is predominantly commercial, with only scattered residential uses; and (4) the surrounding area is not predominantly one-family residential in character.

The Hearing Examiner agrees with the Technical Staff's conclusion that "application of the O-M Zone on the requested properties would meet the purposes of the zone."

C. Compatibility

Compatibility has generally been evaluated in terms of land use, density, height and bulk. The evidence indicates that the proposed use will be compatible with existing and planned development within the surrounding area. The office building planned for the subject property will be situated within the Hillandale Commercial Center and will front on the area marked in the Master Plan as a "Gateway" to Hillandale. The property has a major arterial (New Hampshire

Avenue) to its west, a Beltway ramp to the south, an office building to the east and mixed commercial uses confronting to the north. It is thus compatible with surrounding uses and will serve as an attractive gateway into Hillandale. In the words of Applicant's architect, John Stovall, "[T]he whole concept blends, I think, wonderfully with this site." Tr. 101-103.

As noted by the Technical Staff, the five story building planned for Parcel 18 will be somewhat taller than the surrounding one to three story structures, but still compatible given its location next to the Beltway and other commercial uses.

D. Public Interest

Maryland law requires that any rezoning be in the public interest. As stated in the State Zoning Enabling Act applicable to Montgomery County, all zoning power must be exercised:

“ . . . with the purposes of guiding and accomplishing a coordinated, comprehensive, adjusted, and systematic development of the regional district, . . . and [for] the protection and promotion of the health, safety, morals, comfort, and welfare of the inhabitants of the regional district.” [*Regional District Act*, Maryland-National Capital Park and Planning Commission Article (Art. 28), Md. Code Ann., § 7-110].

Factors which may be considered in determining the public interest include Master Plan conformity, the recommendations of the Planning Board and its staff and possible adverse effects on the surrounding area, public facilities and the environment.

1. Master Plan Conformity; the Planning Board; and the Surrounding Area

The 1997 *White Oak Master Plan* does not specifically recommend a change in the current C-1 zoning; its Land Use Plan does, however, support continuing the current “Commercial/Office” land use on the subject site (page 25).

As noted in Part III.F. of this report, the Master Plan is a guide, and compliance with its recommendations is not mandatory unless the Zoning Ordinance makes it so. See *Richmarr Holly Hills, Inc. v. American PCS, L.P.*, 117 Md. App. 607, 635-636, 701 A.2d 879, 893, n.22 (1997).

Since the provisions of the O-M Zone (Zoning Ordinance §§59-C-4.31, *et seq.*) do not require compliance with the Master Plan, the question of whether or not to reject a requested reclassification due to inconsistency with a part of the Master Plan becomes a policy issue more than a legal question.

The Master Plan includes the subject site within the “Hillandale Commercial Center” depicted in Figure 19 on page 35 of the Plan, and observes that “redevelopment of older office and retail buildings may occur . . .” Figure 19 in the Master Plan designates New Hampshire Avenue and Elton Road as a “Gateway Location.” In Technical Staff’s opinion, “[t]he proposed office building, at this location, will serve as a ‘gateway’ to Hillandale.” Most importantly, the proposed use is consistent with the land use recommended by the Master Plan. Figure 14 on page 25. Community-Based Planning Staff opined that the proposed use would be “consistent with the recommendations of the White Oak Master Plan and is compatible with the existing 1 to 3 story buildings and uses in the Hillandale commercial area.”

Both the Planning Board and the Technical Staff recommended approval of this rezoning application. Moreover, the evidence discussed above demonstrates compatibility with the surrounding area. Accordingly, the Hearing Examiner concludes, based on a preponderance of the evidence, that the rezoning will be in accordance with the Land Use Plan and goals of the 1997 *White Oak Master Plan*.

2. Public Facilities and the Environment

The impact of the proposed development on public facilities has been discussed at great length in Part. III. H. of this report. The only contested issue concerned the appropriate figures to be used in completing the LATR. Based on the testimony of Technical Staff (Tr. 155-158) and the findings in Transportation Planning Staff’s report, the Hearing Examiner concludes that Applicant employed the correct figures and the appropriate analysis in its LATR study. The results of that

study demonstrate that, with the traffic mitigation measures Applicant will undertake (re-striping Elton Road at its intersection with New Hampshire Avenue, and restricting turn directions in the driveway nearest that intersection) the proposed development will satisfy LATR and will not unduly burden traffic in the surrounding area.

This office development will have no impact on schools since there will be no residential units. It is also well served by utilities (Tr. 83), and no evidence was presented to suggest that the proposed development would have an adverse effect on any public services. Similarly, there are no environmental issues in this case. The subject site contains no woodland, floodplain, wetlands or other natural resources; nor have any rare, threatened or endangered species been identified. There are also not trees exceeding 24 inches in diameter. Applicant “will meet the state and Montgomery County requirements for storm water management.” Tr. 82.

For all of these reasons, the Hearing Examiner concludes, based on the preponderance of the evidence, that the proposed reclassification and development would have no adverse effects on public facilities or the environment and that approval of the requested zoning reclassification would be in the public interest.

VI. CONCLUSIONS

Based on the foregoing analysis and after a thorough review of the entire record, I reach the following conclusions with respect to Application G-826:

1. That the requested reclassification to the O-M Zone complies with the requirements of the O-M Zone and its purpose clause;
2. That the requested reclassification to the O-M Zone will be compatible with existing and planned land uses in the surrounding area; and,
3. That the requested reclassification to the O-M Zone bears sufficient relationship to the public interest to justify its approval.

VII. RECOMMENDATION

I, therefore, recommend that Zoning Application No. G-826, requesting reclassification from the C-1 Zone to the O-M Zone of 2.8222 acres of land in adjacent lots, known as Parcels 18 and 23, and located in the 5th Election District, at 10001 New Hampshire Avenue (Parcel 18), and 1701 to 1729 Elton Road (Parcel 23), be **approved** in the amount requested and subject to the specifications and requirements of the final Schematic Development Plan, Ex. 62(a); provided that the Applicant submits to the Hearing Examiner for certification a reproducible original and three copies of the Schematic Development Plan approved by the District Council within 10 days of approval, in accordance with §59-D-1.64 of the Zoning Ordinance.

Dated: April 21, 2005

Respectfully submitted,

Martin L. Grossman
Hearing Examiner